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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 137

JOSEPH B. STRATON, RAYMOND FLESHMAN, AND RANDOLPH BIAS, SPECIAL COMMISSIONERS OF THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA,

versus

ANDY NEW, JR., TRUSTEE IN BANKRUPTCY OF FALL BRANCH COAL COMPANY, A CORPORATION, BANKRUPT; FIRST NATIONAL BANK OF BLUEFIELD, A BANKING CORPORATION, AND EDWIN MANN AND ALL OTHERS SIMILARLY SITUATED ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT BLUEFIELD. IN BANKRUPTCY.

On a Certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR JOSEPH B. STRATON ET AL.

RANDOLPH BIAS,
Counsel for Joseph B. Straton et al.,
Williamson, West Virginia.

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Opinions Below.

No opinion was rendered by the Circuit Court of Appeals, for the reason, as stated by it in the certificate, it was divided and in doubt.

The District Court rendered no opinion, but merely perpetuated the injunction it had theretofore issued, restraining the appellants, officers of the state court, from executing a decree of sale, entered in the creditors' suit in the state court.

Jurisdiction.

The certificate of the Circuit Court of Appeals was filed in this Court on May 22nd, 1930.

Jurisdiction is conferred by U. S. C. A., Title 28, Sec. 346 (originally Section 239, Judicial Code).

Question Presented.

As certified by the Circuit Court of Appeals, a single question is presented:

> "Where creditors have obtained and docketed judgments constituting liens on the real estate of defendant, and have instituted a creditors' suit in a State Court to marshal and enforce the liens and sell the real estate subject thereto, does the bankruptcy of defendant occurring more than four months after the institution of the creditors' suit oust the State Court of jurisdiction, or vest in the Court of Bankruptcy power to enjoin further proceedings in the bankruptcy court?"

Statement.

The certificate from the Circuit Court of Appeals (page 2) recites all the pertinent facts, which, briefly, are these:

(*a*) In April, 1927, Alley obtained a judgment against the Coal Company, now the bankrupt.

(*b*) This judgment was docketed May, 1927, and thereupon became a lien on the real estate of the Coal Company, situate in the county where docketed.

(*c*) February 20, 1928, Alley instituted a creditors' suit to sell the land to satisfy the liens, including his own and those of the two appellees herein, the bank and Mann.

(*d*) In July, 1928, appellants were by the State Court appointed commissioners and directed to sell the land and pay the liens.

(*e*) On August 4, 1928, sixteen months after Alley's judgment was rendered, fifteen months after it became a lien, and five and one-half months after the creditors' suit was instituted, the Coal Company filed a voluntary petition in bankruptcy.

(*f*) On October 11, 1928, while appellants were proceeding to carry out the order of sale, the District Court, upon the petition of appellees (the trustee in bankruptcy and the two lien creditors, the bank and Mann), enjoined the commissioners from proceeding further.

(*g*) This injunction was later perpetuated and an appeal, in due form and time, taken.

BRIEF OF THE ARGUMENT.

1. A Federal district court in a bankruptcy proceeding cannot enjoin nor stay a suit in a State court of competent jurisdiction instituted more than four months before the bankruptcy petition was filed, where the purpose of the suit in the State court is to enforce a lien not dissolved by the bankruptcy.

Metcalf Bros. *v.* Barker, Trustee, 187 U. S. 165 (47 Law. Ed. 122);

Pickens *v.* Dent Roy, 187 U. S. 177 (47 Law Ed. 128);
Taylor *v.* Taylor, 59 N. J. Eq. 86 (45 A. 440);
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In re Snell, 125 F. 154;
Collier on Bankruptcy, Vol. 1, p. 51 and p. 803;
Griffin *v.* Leonard, 266 F. 671;
Abney-Barnes *v.* Davy-Pocahontas Coal Co., 83 W. Va. 292 (98 S. E. 298).

2. The trial court plainly erred in divesting the State court of jurisdiction, or seeking so to do, by the writ of injunction; and its order should have dissolved the injunction and dismissed the petition. What the trial court should have done the Circuit Court of Appeals should now do, and the question should be answered in the negative.

ARGUMENT.

A. The Facts.

A single question is involved. This question is so plain and simple, and the answer to it so obvious, it should have been seen by the trial court. The trial court could not, or did not see it. Hence this appeal. That question is this: Can a bankruptcy court by injunction divest a state court of jurisdiction in a creditors' suit to enforce a lien not affected by the bankruptcy, where the state court assumed jurisdiction more than four months before the petition in bankruptcy was filed? This question has been answered

in the negative so often it would seem no court could now err in answering it. So far as we can learn from a more or less exhaustive examination of the cases the holding has been uniform. The holding has been repeatedly made by this Court, by district courts, and circuit courts of appeal.

Alley, a creditor of Fall Branch Coal Company, reduced his debt to judgment on April 11, 1927, and recorded his judgment promptly, thereby perfecting a lien on all West Virginia real estate of the judgment debtor. Being unable to collect his judgment by execution, he brought a chancery suit to subject the real estate to sale in satisfaction of all liens on it, including his own and those of the appellees, the bank and Mann. He brought this suit on February 20, 1928. The suit took the regular course and the state court, having complete jurisdiction, in July, 1928, pronounced a decree of sale, describing the real estate to be sold (all in West Virginia) and the liens to be paid from the proceeds of the sale. To make the sale it appointed the appellants here as Special Commissioners, and placed them in custody of the real estate, directing sale thereof, payment of costs, and disbursement of the proceeds to lienors in the order of their priorities. This gave the Special Commissioners the same custody and possession of the real estate, and control over it, as if a receiver had been appointed and placed in control.

> "A Special Commissioner, under our law and practice, is of practically the same legal status as a receiver." Boylan v. Hines (W. Va.), 59 S. E. 503.

Assuming the duties, and having executed a bond for the proper discharge thereof, the Special Commissioners (appellants here) now having the real estate in custody, proceeded to discharge the requirements of the decree.

Meanwhile, on August 4, 1928, the judgment debtor, the coal company (the bankrupt here), filed its voluntary petition in bankruptcy. In its schedule of liabilities it listed the debt owing Alley and the debts owing the appellees, the bank and Mann. These creditors, and presumably all other creditors, proved their claims in the bankruptcy court.

Thus we see (*a*) Alley's judgment rendered sixteen months before the bankruptcy petition was filed was not affected by, nor dissolved by, the bankruptcy. U. S. C. Title 11 (bankruptcy) Sec. 107; (*b*) and that the suit to enforce the lien of the judgment was instituted five months and twelve days before the petition in bankruptcy was filed. Under the law, as we are hereafter to see, the bankruptcy proceedings did not and do not terminate the suit in the state court nor permit the federal court to stay that suit nor divest the state court of the custody of the property. A federal court of concurrent jurisdiction with a state court can not at such juncture, and in such way, oust the state court of jurisdiction. The attempt to do it is an unwarranted interference of one court with the orderly processes of the other. Each has its functions, duties, rights and powers, and in the exercise and discharge of these should be free from encroachment upon, or interference by the other. Comity re-

quires it. Our dual system of government demands it. The fact the two courts cover or occupy the same territory in nowise gives the one control over, or supervision of the other. They comprise parts of different systems, operate in different planes and each is, and of necessity must be, wholly free from the processes, injunctive and otherwise, of the other so long as it has jurisdiction and recognizes its limits and the jurisdiction of the other. The bankruptcy statute did not, and does not, abrogate this principle. The federal constitution authorizes a bankruptcy law, but it does not authorize abolition of state courts, nor permit courts of bankruptcy to divest state courts of their jurisdiction beyond the field occupied by federal legislation.

Notwithstanding these facts, and in spite of repeated decisions of this Court to the exact contrary, the bankruptcy court, by its injunction, seeks to take from the custody and control of the state court of undoubted jurisdiction, real estate of the bankrupt, and compel the state court to cease to exercise its jurisdiction.

It is of this we complain and we respectfully, but earnestly, insist that under the facts as shown by the record here to exist, the law forbids this, and calls for reversal of the trial court.

B. The Law.

A Federal district court in a bankruptcy proceeding can not enjoin nor stay a suit in a state court of competent jurisdiction, instituted more than four months

before the bankruptcy petition was filed, where the purpose of the suit in the state court is to enforce a lien not dissolved by the bankruptcy.

Under the authority of the federal constitution, Article I, Section 8, Subsection 4, the Congress has enacted an uniform bankruptcy law. By Article III, Section 2, the judicial power of the federal courts is made to extend to all cases arising under the laws of the United States, and hence to the bankruptcy laws. But such delegated authority and such exercise thereof in no sense denies to the several states and their courts the right to administer the laws in general and to try equity causes. Necessarily, the federal courts and the state courts operate in the same territory and upon the same people. The result is that sometimes there comes a conflict of jurisdiction—there arises a question as to which court, federal or state, has jurisdiction of the person or the thing. In such cases care must be exercised to avoid a clash of authorities. This court frequently has been called upon in such cases, and, so far as we can observe, has established a rule for all courts to follow. In Peck *v.* Jenness, 48 U. S. 611 (12 Law. Ed. 841), the court said:

> "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to

prosecute his suit in it, have once attached, that right can not be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other:"

"The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."

As between courts of the same system this rule is called comity—a matter of convenience and of having a decent regard for the actions of others; but as between federal courts on the one hand and state courts on the other, it has been said to be more than a rule of convenience, and is called a principle of right, of necessity, and of law.

In Covell *v.* Heyman, 111 U. S. 176 (28 Law. Ed. 390), Mr. Justice Mathews speaking for the court said:

"The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanctum that the utility which comes from concord; but between State Courts and those of the United States, it is something more. It is a principle

> of right and of law, and, therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory but not in the same plane; and when one takes into its jurisdiction a specific thing, that *rès* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void."

In Wabash Railroad Company *v.* Adelbert College, 208 U. S. 38 (52 Law. Ed. 379), this Court, speaking through Mr. Justice Moody, said:

> "When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which might otherwise result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession, or the control of the property. In the courts of the United States this inci-

dental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application, and not peculiar to the relations of the courts of the United States to the courts of the state; they are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons, and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice; and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the states and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the states of the Union."

One of the latest expressions of this court, which shows how consistently it has followed this rule, is that of Mr. Chief Justice Taft in Harkin *v.* Brundage, decided February, 1928, and reported 276 U. S. 36 (72 Law. Ed. 457), in which case the court reversed both the district court and the circuit court of appeals of the Seventh Circuit. There was a controversy between the Illinois State Court and the federal district court for the Northern District of Illinois as to which had jurisdiction in a receivership proceeding. The

bill was filed in the state court five days before one was filed in the federal court. The federal receiver obtained actual possession of the property and there was question as to whether the receiver for the state court at the time had constructive possession. The trial court and Circuit Court of Appeals held the district court had jurisdiction. In reversing them the Chief Justice said:

> "The principle which should govern in a conflict of jurisdiction like this has been a number of times stated by this court. As between two courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and can not be deprived of its right to do so, because it may not have obtained prior physical possession by its receiver of the property in dispute; but where the jurisdiction is not the same or concurrent, and the subject-matter in litigation in the one is not within the cognizance of the other, or there is no constructive possession of the property in dispute by the filing of a bill; it is the date of the actual possession of the receiver that determines the priority of jurisdiction."

Two other cases which will illustrate the principle and the rule are Murphy *v.* John Hofman Company, 53 Law. Ed. 326, and Taubel-Scott-Kitzmiller Company *v.* Fox *et al.*, 68 Law. E. 772.

Ordinarily, the rule is invoked and applied when a federal court is said to encroach on the jurisdiction of

a state court; but it is just as applicable when the state court is the aggressor.

On principle there is as much right in a state court to enjoin a federal court or its officers as there is in the latter to stay or enjoin the former. In the instant case there was as much, or even greater right in the state court to enjoin the federal court and its trustee in bankruptcy from disturbing the state court and its officers in their possession of the *res*—the real estate. This real estate was and is in *custodia legis*, the actual custody of these appellants, and there was and is greater right in the state court to employ its injunctive process to restrain the bankruptcy court and its trustee from disturbing the officers of the state court, these appellants, in their custody of the property. This is precisely what was done, by indirection, by the Georgia Court in Strickland *v.* Darsey, 156 Ga. 717, 120 S. E. 7, 32 A. L. R. 974. As in that case a superior court of Georgia enjoined a creditor from proving as a lien his claim in a bankruptcy proceeding instituted more than four months after the original petition was filed and a receiver was appointed in the state court, and the Georgia Supreme Court affirmed the superior court.

If the federal court may enjoin the state court, then the state court may enjoin the federal court and neither court nor litigant in either gets anywhere. It is to avert and avoid such an intolerable and impossible situation that the rule, sometimes called comity, sometimes called rule of necessity, or rule of law, was made and is applied, followed and observed—and is here invoked.

But it may be argued, the Congress has said injunctions may issue in bankruptcy proceedings. That is true, but the Congress by implication, and this court has repeatedly said, in direct expression, when and only when an injunction may issue to restrain a proceeding in a state court—and the plain implication and direct expression forbid its use in the instant case.

There are those who, for some inexplicable reason, contend the cases *In re* Watts, 190 U. S. 1 (47 Law. Ed. 933), U. S. F., and G. Company *v.* Bray, 225 U. S. 205 (56 Law. Ed. 1055), and Bailey *v.* Blackmon, 14 F. (2nd) 16, authorize an injunction in this case, and in similar cases. An analysis of the cases shows the contention unfounded in fact and unwarranted in law.

The opinion in *Re* Watts and in *Re* Sachs was written by Mr. Chief Justice Fuller in May, 1903, less than six months after he had written the opinions in Metcalf *v.* Barker, 187 U. S. 165 (47 Law. Ed. 122), and in Pickens *v.* Roy, 187 U. S. 177 (47 Law. Ed. 128). The court was unanimous in all three decisions—there was no dissent. These last two named cases are decisive of this case, as we are hereinafter to point out. In them the court in simple and unmistakable language expounded the law, as set out in the proposition at the beginning of this argument on the law. Despite this fact, and the fact the seven then sitting associate justices all concurred with the Chief Justice in this opinion in these two cases, it is argued now that the Chief Justice and the still acting six associate justices did an about-face and reversed themselves in the Watts case, decided less than six months later! (It should be noted (*a*), Mr. Justice Gray died September 15, 1902, and

that his successor, Mr. Justice Holmes, was not appointed until December 4, 1902, and that (*b*) therefore only seven associates were sitting when the Metcalf *v.* Barker and Pickens *v.* Roy cases were decided, and (*c*) that Mr. Justice Shiras after these decisions, and on February 23, 1903, resigned and that his successor, Mr. Justice Day, was sworn in March 2, 1903, and that (*d*) therefore the Chief Justice and Justices Harlan, Brewer, Brown, White, Peckham, and McKenna concurred in all these opinions.) It is impossible the seven men could, or would in six months all change their minds on what is the law—and they did not do it, and the opinion *In re* Watts does not say they did.

The most frequently quoted portion of the opinion cited in support of the contentions made, carries its own refutation of the contention. It is: "The bankruptcy law is paramount, and the jurisdiction of the Federal Courts in bankruptcy, *when properly invoked*, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive." The italics are supplied by us to point out the refutation to the contention. *When properly invoked* comprehends and contemplates the jurisdiction will be and is *invoked at a proper time*—and a (*the*) proper time is within four months after the state court suit is brought to enforce a lien not affected by the bankruptcy. That is what it means and what the court meant and all that could be meant. When we examine the facts and carefully read the court's opinion this is too clear to admit of argument.

The Watts case was essentially a contempt proceeding against an attorney and only incidentally a bank-

ruptcy case. Moreover, and of decisive importance, these are the facts as to the four months' rule, or the four months' period: The proceedings in the state court started December 29, 1902, and the petition in bankruptcy was filed just five weeks later, on February 6th, 1903. Therefore the four months' period had no application and the decisions in the Metcalf and Pickens cases were not applicable, and not being applicable, not mentioned in the Watts opinion. It is impossible to see how that opinion reverses, distinguishes, or in any wise modifies the opinions in the other two cases. True it is some district courts have (and perhaps a circuit court of appeals has) held the Watts case, decided after the 1903 Amendments to the Bankruptcy Statute, disaffirms the earlier decisions of the same court; but we respectfully submit such conclusions are erroneous. The facts were wholly unlike on the essential point (the four months' period) now under consideration, and we are unable to find anything in the amendments of 1903 at all applicable to the Watts case and the decision in it, and certainly there is nothing in the 1903 amendments applicable to the instant case.

In United States Fidelity & Guaranty Company *v.* Bray, *supra*, the controversy was between two federal courts, the bankruptcy court the first to start in motion, and the question of the four months' period did not arise at all. We are unable to see how this decision can be found to have any application to the instant case.

In Bailey *v.* Blackmon, 14 F. (2nd) 16, these important facts are significant:

(*a*) A petition in Bankruptcy was filed by Bailey on September 3, 1921;

(*b*) An injunction issued from the bankruptcy court to restrain the bankrupt, his wife, and his daughter from making any disposition of his property, on September 6, 1921;

(*c*) On November 1, 1921 (almost two months *after* bankruptcy proceedings started), the state court proceeding started;

(*d*) On the next day, November 1, 1921, Bailey was adjudged a bankrupt.

The question involved in this case was not involved there at all; and the four months' period has no application.

Moreover, the Circuit Court of Appeals, in that opinion, took pains to say that which clearly shows the law of that case when applied to this case, that the trial court erred in perpetuating the injunction.

Judge Waddill, speaking for the court, said:

> "To prevent misapprehension, it should be stated that nothing in what has been said in any way questions the right of the state court to entertain the foreclosure suit, in spite of the fact that it was begun nearly two months after the filing of the petition in bankruptcy. The right of the mortgagees in it to enforce their lien was not affected by the fact that the title to one of the junior lienors arose out of an assignment of the bankrupt. It may also be admitted that when the state court in the foreclosure proceedings took possession of the mortgaged property, put it up for sale, and took the proceeds into

> its hands, it was by the ordinary rules of law bound to hear any one claimed to be interested in them. If there were conflicting claims upon any part of the funds, it ordinarily had jurisdiction to pass upon them, and, without its consent, no court of merely concurrent jurisdiction could in any wise interfere. The question of whether Miss Bailey or the trustee in bankruptcy had the better claim to the third lien on the property in process of foreclosure was, however, altogether separable from every other question in the case. It was one which in its nature would ordinarily have been within the jurisdiction of the court of bankruptcy. Moreover, before the institution of the suit in the state court, the court of bankruptcy had begun its inquiry into some of the conveyances from the bankrupt to his daughter, and in addition had issued its injunction to prevent the alienation of the property dealt with in them."

The Bailey *v.* Blackmon opinion cites a number of cases, now to be briefly examined.

A. New River Coal and Land Company *v.* Ruffner, 165 F. 881. In this case the suit in the state court started February 7, 1907. The petition in bankruptcy was filed forty-six days later, on March 25, 1907; and on April 18, 1907, the bankruptcy was adjudicated. In this opinion, the court, with Judge Waddill concurring, said:

> "The whole proceeding in the state court from the commencement of the action was within four months from the filing of the petition in bankruptcy, and of the adjudication of the Cataract Colliery Company a bankrupt."

B. Virginia Iron Coal and Coke Company *v.* Olcott, 197 F. 730: In this case the petition in bankruptcy was filed in New York on August 3, 1910, and a receiver appointed. A supplemental petition was filed in North Carolina on August 10, 1910, and the New York receiver made ancillary receiver in North Carolina. "Thereafter" the company was adjudged a bankrupt. On October 25, 1910, upon petition asking permission of the North Carolina bankruptcy court so to do, certain creditors "thereupon" brought suit in the North Carolina state court.

It is true that in this case Judge Pritchard, speaking for the court, in the opinion, said:

> "If the court below had jurisdiction, it necessarily follows that such jurisdiction was exclusive, in so far as the administration of the affairs of the bankrupt is concerned, and the court, in the exercise of its discretion, had the power to stay any proceeding in the state court instituted four months prior to the proceedings in bankruptcy."

The opinion and the record disclose the court below had jurisdiction because the bankruptcy proceedings were, in fact, first instituted (and not instituted four months after the proceedings began in the state court).

Clearly through oversight or some clerical error, the word "within" is omitted from the opinion immediately before the words "four months"—and this part of the opinion should read, and was intended to read: "any proceedings in the state court instituted *within* four months."

C. Bank of Andrew *v.* Gudger, 212 F. 49: That this case in nowise can be properly cited in support of the contention of appellees is made evident by this part of the opinion of the court, written by Judge Woods:

> "Such a case is entirely apart from those cases in which a creditor has gone into the state court and established or acquired by his suit a legal or equitable lien on the property in the hands of the court four months before the filing of the petition in bankruptcy. In such cases the courts have held that the creditor is entitled to enforce his lien in the first court that acquired jurisdiction. The distinction is also evident between this case, and those cases where the state court held the property by its receiver, and there was no question of the subsequent coming into existence of facts giving rise to the right to invoke the exclusive jurisdiction of the federal court."

D. Collett *v.* Adams, 249 U. S. 545 (63 Law Ed. 764): These facts in this opinion are important.

1. On December 22, 1916, a transfer of real estate and personal property was made by the bankrupt to Adams, the respondent.

2. On March 17, 1917 (less than three months after the transfer) a petition in bankruptcy was filed against Cotten, the bankrupt.

3. The opinion holds that under Section 60*b* of the Bankruptcy Act—the four months statute, the bankruptcy court had and could exercise jurisdiction *and expressly refrains from considering what the court's*

decision would be if a suit to avoid the transfer had for four months been defending in the state court on a lien not dissolved by the bankruptcy.

The case of Grafton Gas and Electric Light Company, 253 F. 668, decided in 1918, by the District Court for the Northern District of West Virginia, apparently upholds the contention of appellees and the decision of the trial court in the instant case, although (*a*) the report fails to show the state court proceedings in the Grafton Case were instituted more than four months before bankruptcy proceedings started, and (*b*) Judge Dayton, the trial judge in the Grafton Case, cites with apparent approval, New River Coal and Land Company *v.* Ruffner and Andrews *v.* Gudger, hereinbefore examined, both shown to support our contention here made.

Also, Graham *v.* Davy Pocahontas Coal Company, 238 F. 488, decided in 1916, apparently supports the trial court's decision in the instant case, although Judge Pritchard, speaking for the Circuit Court of Appeals apparently had some misgivings on the question, as is shown by this:

> "The appellee also based its motion in the court below upon the following grounds:
>
> 'That the petition affirmatively shows that more than four months prior to the institution of these proceedings a creditors' suit was instituted in the Circuit Court of McDowell County, West Virginia, requesting that court to assume jurisdiction over and take in its custody the property of the said Davy-Pocahontas Coal Company and administer the same

for the benefit of those entitled, and the petition does not show any impelling reason which would cause this court to supersede the jurisdiction of said state tribunal.

"In view of the present state of the record, we do not deem it necessary to enter into an extended discussion of this point, further than to say that, once a bankruptcy court assumes jurisdiction in a case like the one at bar, it necessarily draws unto itself, in the administration of the persons's or corporation's affairs, jurisdiction and supreme control of the estate of such bankrupt; and this is undoubtedly true in this instance, inasmuch as the alleged acts of bankruptcy occurred within four months prior to the filing of the petition.'"

And then apparently bottoms his decision on the Watts case, which, as we have already seen, is not authority for the decision of the trial court in this case.

This Court, whose voice is final in all cases properly before it, has never unsaid what it said in the Metcalf and Pickens cases, has not recanted, nor disaffirmed its decisions there rendered. So far as we can discover, those who argue it has done so rely solely on the Watts and Bray cases.

The trial courts in the Grafton case comments on the fact there is no statutory provision for the four months interval, and says or indicates there is no authority to sustain those who contend this is the law. It is true the law is not statutory, but it would seem unnecessary to say much law, and many applications of law lack statutory authorization. It is not for us

to concern ourselves as to *why* the law, or *whence* its origin; but rather to content ourselves with a knowledge of *what it is.*

The federal constitution (Article 3, Section 1) expressly says "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time ordain and establish." Which provision, as can not be denied, makes this Court the sole and final interpreter of the law, and its final exponent when there is doubt.

This Court has spoken in language so simple, plain and clear that it is difficult to see how there can be two opinions as to what the law is.

Aside from all earlier expressions of the court of the same import, let us begin our examination of its opinions as to what it holds to be the law governing in the case at bar and in similar cases, with Metcalf *v.* Barker, 187 U. S. 165 (47 Law Ed. 122). In that case the Court, speaking through its Chief Justice, after quoting Section 67 F. of the Bankruptcy Act of 1898, which for this study is of the same effect as subsection C, Section 107, U. S. C. Title Eleven (the present Bankruptcy Act), says:

> "In our opinion the conclusion to be drawn from this language is that it is the lien created by the levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that *where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed null and void on adjudication, but its validity is recognized.* Where it is ob-

> tained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so, the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial."

In what plainer words, or words freer from ambiguity, could have the court said, as applied to the case we now consider: Since Alley sixteen months before the filing of the petition in bankruptcy by a judgment obtained a lien against the property of the bankrupt, the lien is not only not to be deemed null and void on adjudication, but it is validated and recognized?

The opinion then goes on to decide the district court which sought to stay the court proceeding by injunction is without jurisdiction so to do.

On the same date, December 1, 1902, the Chief Justice in Pickens *v.* Roy, 187 U. S. 177 (47 Law Ed. 128), in affirming the opinion of this Court, as announced by Judge Goff, said: "We are of opinion that the Circuit Court of Appeals was right in its ruling"; and in so doing quoted from, affirmed, and approved the opinion of that court, which said:

> "The bankrupt Act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all its details, *provided the suit pending in the state court was instituted more than four months before the district court of the United States had adjudicated the bank-*

ruptcy of the party entitled to or interested in the subject matter of the controversy."

In what plainer language, or language freer from doubt or uncertainty, could have the court said, as applied to the case now considered: Since Alley more than four months before the bankruptcy petition was filed, instituted his suit in the state court, the filing of the petition and adjudication thereon did not divest the state court of jurisdiction, but it was *its right and duty to proceed to final decree?*

It is proper here to observe that the Bankruptcy Act now in effect, after all the amendments of 1903, 1910 and subsequently, does not modify but continues carefully to guard the rule referred to, in so far as applicable to the instant case.

Respectfully we submit the law as interpreted, expounded and announced in these two cases is still the law, unrevised, unaltered and without modification.

Then came the Watts case, at the same term, less than six months later, and when the personnel of the court as to seven of its members was unchanged. We have already discussed this case and tried to point out how and wherein some courts since then have obviously misread it, or misapprehended the decision and opinion.

Without attempting to review all cases in this court on this question (conflict of jurisdiction where the state court proceedings were instituted on a valid lien more than four months before the bankruptcy petition was filed) and without examination of the cases decided by the district courts and circuit courts of ap-

peal, let us now see what in at least some cases has been the action of this court since the Watts decision; and we should here say *we have been unable to find a decision which revises or modifies the Metcalf and Pickens decisions.*

In Globe Bank and Trust Company *v.* Martin, 236 U. S. 288 (59 Law. Ed. 583), the court in denying to creditors in suits not supported by liens pre-existing four months, and the suits not brought four months before bankruptcy petition filed, the right to continue jurisdiction in the state court contrary to the bankruptcy court's jurisdiction, refers with clear approval to the Metcalf decision and speaks of it as being now recognized as the opinion of the court.

In Blair *v.* Brailey, 221 F. 1, decided 1915, by the Circuit Court of Appeals of the Fifth Circuit, the court said: "Where a valid judicial lien or levy has been secured or made four months or more prior to the bankruptcy, proceedings to enforce the same may be prosecuted to the end." *And this court denied certiorari,* 238 U. S. 634 (59 Law. Ed. 1499).

In Stellwagen *v.* Glum, 245 U. S. 605 (62 Law. Ed. 507) decided 1918, this court in holding a state court proceeding terminated by bankruptcy proceedings ensuing in less than four months said: "In such cases, the bankruptcy proceedings, taken within four months, displace those in the state court and terminate the jurisdiction of the latter," *and cites in support of its decision the Watts Case.*

In Piedmont Coal Company *v.* Hustead, 294 F. 247, in which was involved the estate of Josiah Thompson,

Bankrupt, decided 1923 by the Circuit Court of Appeals of the Third Circuit, the court held:

> "* * * As the state courts of West Virginia had more than four months prior to the bankruptcy acquired complete jurisdiction and control over the property of the bankrupt thereby attached, they were not divested of their jurisdiction by the bankruptcy of the debtor, nor was their jurisdiction capable of being stayed or arrested by the injunctive process of the district court in which bankruptcy proceedings were pending." Citing the Metcalf and the Pickens cases. "In other words, the plaintiffs in the state suits chose to stand on the security of the liens which the state courts had given them. On the authorities cited we have no doubt they had a right so to do."

The court goes on to say:

> "But the power of a court of bankruptcy to sell, free of liens, property which has come into its control by reason of title and possession derived by the trustee from the bankrupt, does not extend to property whose possession and control has been acquired by another court more than four months before bankruptcy. Here the principle of Metcalf Bros. *v.* Barker and Pickens *v.* Roy enters. And when a state court has thus acquired possession of the property by seizure, its jurisdiction, on authority of Murphy *v.* John Hofman Co. is exclusive of the jurisdiction of all other courts, including courts of bankruptcy, and it may proceed thereon to final disposition. If this were not so, and if the proposition here made, that all

> property of the bankrupt may be sold free of liens, whether in process of enforcement by other courts or not, then the jurisdiction of the court of bankruptcy would be paramount to that of all courts, and there would be neither occasion nor reason for the law announced in Metcalf Bros. *v.* Barker, Pickens *v.* Roy, and Murphy *v.* John Hofman Co. *supra;* Griffin *v.* Lenhart (C. C. A.) 266 Fed. 671; Eyster *v.* Gaff, 91 U. S. 521, 23 L. Ed. 403; Peck *v.* Jenness, 7 How, 612, 12 L. Ed. 841, and Pickens *v.* Dent, 45 C. C. A. 522, 106 Fed. 653. Of course, all that statement means that a court of bankruptcy may sell, free of liens, property which is within its possession and therefore within its jurisdiction, for obviously it can not sell free of liens property which is in the exclusive control of another court."

This last sentence is the complete answer to those who seek to find more in the expression of different courts, in the Watts and other cases, of "the exclusive jurisdiction of the bankruptcy court." In the case at bar the bankruptcy court does not have, and has never had jurisdiction over, or control of, the real estate proceeded against in the creditors' suit in the state court begun more than five months before bankruptcy, and based on valid liens sixteen months old.

It should be here noted this court denied a writ of certiorari in this case. 264 U. S. 582 (68 Law. Ed. 860.)

In Taubel-Scott Kitzmiller Company *v.* Fox, 264 U. S. 426 (68 Law. Ed. 770), this court in holding valid the custody of a state court and its officers, and th

citing with approval the Metcalf and Pickens cases, said:

> "A trustee seeking to have declared void, under subdivision *f* of Sec. 67, a lien obtained through legal proceedings, and to recover possession of property, may be confronted with an adverse claim upon several grounds. It may be asserted that the lien attacked is of a character different from those provided for in that subdivision. Or, although the lien (*i. e.*, that obtained by levy of execution) is clearly one to which subdivision *f* applies, that it is valid by reason of other facts. For the statute does not, as a matter of substantive law, declare void every lien obtained through legal proceedings within four months of the filing of the petition in bankruptcy. The lien may be valid, because the debtor was, in fact, solvent at the time the levy was made. Or, although the debtor was then insolvent, because the property had passed into the hands of a *bona fide* purchaser. *Or, although the debtor was then insolvent and the levy was made within the four months, because inchoate rights by way of lien had been acquired earlier. As the establishment of any one of these facts would bar recovery by the trustee, their assertion presents a judicial question.*"

Without pursuing the inquiry further it is plainly seen this Court continues to hold the law to be as laid down in the Metcalf and Pickens cases, and as affirmed in the proposition at the opening of this argument of the law.

Text Writers and Other Authorities.

Reinforcing our conclusion as to this being law as so determined by the court, we invite the court's attention to what is said by the authorities, all of whom speak since the Watts decision:

1. The editors of U. S. C. A. Title Eleven, Section Eleven, page 70, note 33, say:

> "The general rule has been laid down in numerous cases, including cases in the Federal Supreme Court, that when a suit in a state or a federal court has been, prior to the commencement of bankruptcy proceedings, instituted to enforce a valid lien on the bankrupt's property which lien is unaffected by the subsequent bankruptcy proceedings, and such court, having first obtained jurisdiction over the property subject to the lien, may proceed to final judgment and the enforcement of the lien. The jurisdiction of the bankruptcy court does not supersede the jurisdiction of such court, and the plain title in such suit can not be compelled to seek the enforcement of the lien in the bankruptcy court."

2. Collier on Bankruptcy holds:

> "It is a familiar rule of law, of universal application, essential to the orderly administration of justice, that in order to avoid a conflict between tribunals of co-equal authority, the court first acquiring jurisdiction must be allowed to pursue it to the end to the exclusion of others, and that it will not permit its jurisdiction to be impaired or subverted by a resort to some other tribunal."

Collier on Bankruptcy, Volume 1, page 51 (Thirteenth Edition).

"A suit in a state court to foreclose a mortgage, or to enforce valid liens acquired more than four months before bankruptcy, against specific property, commenced before a petition in bankruptcy is filed against the mortgagor or lienor may be prosecuted in the state court without interference from the court of bankruptcy."

Collier on Bankruptcy, Volume 1, page 803 (Thirteenth Edition).

3. Loveland on Bankruptcy states the law to be:

"Where property is in the actual and lawful possession of a state court or an officer thereof and such court has jurisdiction to administer such property, its possession will not ordinarily be disturbed by process issued by a court of bankruptcy. Thus where the possession of a state court is acquired by a judgment creditor's suit begun more than four months prior to bankruptcy."

Loveland on Bankruptcy (Third Edition), page 115.

4. Remington on Bankruptcy states it this way (2nd Ed. Section 1599):

"To the rule that the state court will retain jurisdiction if it is the first to obtain custody of the property, there are three exceptions: First, where the possession of the state court has itself created a lien by legal proceedings within four months of the bankruptcy, whilst

the debtor was insolvent; second, where a receiver, assignee or trustee appointed by the State Court within four months of the bankruptcy, is in possession; third, where the possession is under state insolvency proceedings that are superseded by the Bankrupt Act."

5. R. C. L. phrases it in this way:

"The provision that liens created within four months shall be dissolved is equivalent to an express provision for the preservation of liens obtained prior to that time."

3 R. C. L., Section 115, page 291, citing Metcalf *v.* Barker.

"The lien acquired by the institution of a creditor's suit within four months before the adjudication in bankruptcy is annulled by section 67 *f*."

3 R. C. L., Section 116, page 292.

6. It is stated in this way by C. J.:

"A court of bankruptcy will not go beyond its own legitimate functions and interfere with the regular course of proceeding in an action pending in another court; but the proceedings therein may be continued, unless the action is such as must be stayed under the provisions of the Bankruptcy Act; and on the other hand no other court can assume to pass upon any matters relating to the bankrupt or his property which legitimately fall within the powers of the bankruptcy court, nor can the pendency of proceedings in a state court limit or affect the right to file a petition in bankruptcy. Accord-

ingly, where some other court has obtained possession of property, its jurisdiction over such property and its right to determine the ownership or disposition thereof is not affected by subsequent proceedings in a court of bankruptcy, unless instituted within four months after such possession was acquired."

7 *C. J.*, Section 28, page 31.

We respectfully submit that the question certified should be answered in the negative.

JOSEPH B. STRATON,
RAYMOND FLESHMAN,
RANDOLPH BIAS,
Appellants (Below),
By RANDOLPH BIAS,
Their Counsel.

Williamson, West Virginia, January 28, 1931.

3n

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CHARLES ELMORE C

Supreme Court of the United States

OCTOBER TERM, 1930

No. [redacted] -137

JOSEPH B. STRATON, RAYMOND FLESHMAN, AND RANDOLPH BIAS, SPECIAL COMMISSIONERS OF THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA, Appellants,

versus

ANDY NEW, JR., TRUSTEE IN BANKRUPTCY OF FALL BRANCH COAL COMPANY, A CORPORATION, BANKRUPT, FIRST NATIONAL BANK OF BLUEFIELD, A BANKING CORPORATION, AND EDWIN MANN, AND ALL OTHERS SIMILARLY SITUATED, ET AL., Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT BLUEFIELD. IN BANKRUPTCY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Supreme Court of the United States

OCTOBER TERM, 1930

No. 920

JOSEPH B. STRATON, RAYMOND FLESHMAN, AND RANDOLPH BIAS, SPECIAL COMMISSIONERS OF THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA, Appellants,

versus

ANDY NEW, JR., TRUSTEE IN BANKRUPTCY OF FALL BRANCH COAL COMPANY, A CORPORATION, BANKRUPT, FIRST NATIONAL BANK OF BLUEFIELD, A BANKING CORPORATION, AND EDWIN MANN, AND ALL OTHERS SIMILARLY SITUATED, ET AL., Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT BLUEFIELD. IN BANKRUPTCY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

TO THE HONORABLES THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners Andy New, Jr., Trustee in Bankruptcy of Fall Branch Coal Company, First National

Bank of Bluefield, and Edwin Mann respectfully submit that in order to answer the queston certified and to do justice it will be absolutely necessary for the court to have the entire record so that it may see on what facts the District Court for the Southern District of West Virginia granted the injunction, *none of which appear in the certificate.* Your petitioners, under the provisions of Rule No. 37, request that this court enter an order directing the Clerk of the United States Circuit Court of Appeals to send up the entire record. In support of this application your petitioners here state that the following are uncontroverted facts appearing in the record:

The Fall Branch Coal Company, owning coal lands, leases and improvements lying in the States of Kentucky and West Virginia, separated only by Tug River, which constitutes the States' boundaries, was on the 4th day of August, 1928, adjudicated a bankrupt upon a voluntary petition filed on that date. On the 21st day of August, 1928, various creditors and their counsel appeared at the first meeting of the creditors, among them being appellant Randolph Bias, who appeared for himself and the other appellants, and represented prior, lien and unsecured creditors. Included in the claims proven by appellants are a number of judgments which had been obtained against the bankrupt and proven in a judgment creditors' suit instituted in the Circuit Court of Mingo County, West Virginia, in February, 1928, in which suit a decree of sale was entered on the 17th day of July, 1928. Appellants, Messrs. Bias, Straton and Fleshman (the latter associated in the practice of law with Mr. Bias), were counsel prosecuting the suit and were

appointed Special Commissioners to sell the West Virginia property. The claims proven and voted by Mr. Bias at the first meeting of the creditors comprise all the liens proven in the chancery suit, with the exception of the first and second liens, which are held by appellees The First National Bank of Bluefield and Edwin Mann, who also proved their claims in the bankruptcy court; hence *all* creditors who proved claims in the chancery suit appeared and proved their claims in the bankruptcy proceedings. Appellant Bias, on behalf of the firm of Staten and Keesee, attorneys of Pikeville, Kentucky, who were unable to be present at the first meeting, also proved the claims of all the sixteen lessors, for rent due under the coal land leases lying in Kentucky. He also filed a number of labor claims and asserted priority for them; and proved other claims that had been reduced to judgment but which had no priority. (R. p. 8-9-10.)

The total amount owing on the first and second liens, being deeds of trust held by appellees, The First National Bank of Bluefield and Edwin Mann, was, on the 21st day of August, 1928, $56,580.69. The total of the junior liens set up in the chancery suit is $6,678.78, of which amount $3,144.61 represents judgments taken *within* four months of the adjudication in bankruptcy, leaving only $3,534.17 in liens which were not avoided by the adjudication in bankruptcy and all of which are junior to the first and second liens amounting to $56,580.69. Appellant Bias represented in the chancery suit only the third lien ($228.60); and the twelfth lien ($584.22), which latter is included in the item of $3,144.61 mentioned above and should be avoided by the bankruptcy proceedings but will not be if the State Court retains jurisdiction.

On the morning of the first meeting Mr. Bias and Mr. New came to Bluefield from Williamson. There was a contest over the election of the Trustee and Mr. Bias nominated and elected Mr. New. To elect their nominee, appellants, thru Mr. Bias, proved the judgments, for which they now claim priority to defeat the jurisdiction of the bankruptcy court, as "Unsecured—No priority." (R. p. 8.) Mr. Bias took the lead in the deliberations with respect to the amount of the Trustee's bond, which was fixed, with his approval, at $30,000.00. He actively participated in the discussion as to the amount of insurance the Trustee should carry on all of the property situate in both States. This was fixed, with his approval, at $50,000.-00. With his knowledge and consent the Trustee on that day insured the property in Kentucky and West Virginia for $50,000.00. (R. p. 3 and 25.)

At this meeting, the matter of having the Trustee take active charge of the property in West Virginia and Kentucky and protect the same by and through a custodian, or guard, was fully discussed. Mr. Bias actively participated therein and, with his approval, his nominee and Trustee was authorized to employ a custodian to take actual possession of all the property, and he did so. And ever since that time the property has been in actual possession of the Trustee through his custodian, with the approval of appellants. (R. p. 3 and 25.) Appellants never had possession of the property actually or constructively. The property was in the actual possession of the Corporation up to the time of the appointment of the Trustee in Bankruptcy on August 21st, 1928, when actual possession passed to the Trustee by and through his cus-

todian. The Commissioners were appointed under the provisions of Section 1, Chapter 132, of the Code of West Virginia, which limits their authority to that of making sale of the property.

Mr. Bias took a leading part in the selection and appointment of the appraisers. (R. p. 3.) With his approval the appraisers entered upon the performance of their duties, and made a detailed inventory and appraisal of the property in West Virginia and Kentucky. In fact it was he who instructed them in the performance of their duties. (R. p. 10.)

At this meeting Mr. Bias moved the Referee to enter an order authorizing the Trustee to operate the property of the bankrupt, which motion the Referee took under consideration, and later refused to grant. (R. p. 3 and 31.)

Mr. Bias was at least willing to accept the appointment as counsel for the Trustee. He consulted the Referee with respect to appointing him counsel for the Trustee. The Referee advised him that because of his representation of creditors it would be necessary to obtain authority from the Judge to make this appointment. (R. p. 69-72-73-74.) Mr. Bias did not wish the Referee to do this and he then suggested the name of Mr. E. A. Hansbarger as counsel for the Trustee, whom the Referee at that time appointed. Later, when this controversy arose, Arthur F. Kingdon was joined with Mr. Hansbarger.

Pending consideration of the motion to authorize the operation of the plant and the completion of the

appraisal, no further order was entered. But on the 12th day of September the Referee entered an order declining to authorize the Trustee to operate the plant and directing him to advertise the property for sale, of which order appellant Bias had notice. (R. p. 69 and 5.) The execution of this order was delayed at the request of The First National Bank of Bluefield and Mr. Mann, who represented to the Referee that they had a prospective purchaser for all of the property.

Subsequent to the 21st day of August, nothing was heard from Messrs. Bias, Stration or Fleshman until the 6th day of October, 1928, when the Trustee, Referee and the officers of The First National Bank of Bluefield and Edwin Mann learned that the respondents had advertised the property of the bankrupt situate in West Virginia, under a decree of the Circuit Court of Mingo County, West Virginia, to be sold on October 15th. (R. p. 4-71-68-64-65.) Neither the Referee, the Trustee whom Mr. Bias elected, nor his counsel, was advised of the move to sell the property under the Circuit Court decree. (R. p. 69-65-65-4.) They first learned of the sale by seeing an advertisement in the Williamson paper on or about the 6th day of October, 1928. Appellants reside in Williamson. Mr. New resides within six miles of Williamson. Mr. Hansbarger resides in Williamson. He was absent from the 6th day of September to the 26th day of September, 1928, which Mr. Bias knew. Being unable to persuade appellants to abandon their proposed sale, counsel for the Trustee advised appellants that if they would agree to postpone their sale for a short time he would immediately take up with the Referee the question of having the Trustee in Bankruptcy advertise the

property on the Kentucky side, holding both sales at one time if practicable, but appellants declined to accede to this request. (R. p. 66.) (Appellants deny this, but on a review of the facts we take it the finding would be in favor of the appellees.)

Following this refusal the Trustee, The First National Bank of Bluefield, and Edwin Mann filed their petition with the District Court, setting up the foregoing facts and averring that the District Court had lawfully acquired complete and exclusive jurisdiction to administer the property of the bankrupt and that for this reason as well as because of the great injury which would accrue to the appellees and all other creditors, an injunction should be granted enjoining and restraining appellants Bias, Straton and Fleshman from proceeding to sell the property on the West Virginia side of the river, and for such other relief as should be just and lawful. A temporary injunction was granted on the 15th day of October, and later an answer was filed and a motion to dissolve made. Later the matter was argued by counsel and, by agreement, the whole matter was submitted "as if upon a final hearing, the affidavits being considered as depositions and the exhibits as if introduced with depositions." (R. p. 23.) On the 15th day of December, 1928, the injunction was perpetuated, from which decree appellants appealed.

The material uncontroverted facts with respect to the great damage which *all creditors* will suffer by a divided sale, and with respect to the equities of the case generally are as follows:

The property of the bankrupt situate in West Vir-

ginia consists of dwellings, store and office building, garage, stable, store stock and fixtures, tool and supply house, live stock and stable equipment and 5.4 acres of land in fee, on which there is situate the coal tipple, picking tables, etc., various other mine buildings, one end of an aerial tramway, extending from the tipple in West Virginia to the mine openings across the river in Kentucky, and other miscellaneous improvements, including the railroad siding. All of the foregoing is appraised at $45,948.00, which is $10,632.00 less than the amount of the first and second liens held by appellees, The First National Bank and Mr. Mann, respectively. The property in Kentucky, immediately across the river from the property in West Virginia, consists of 8.83 acres of land in fee, numerous leaseholds, three dwellings, part of the aerial tramway and equipment, electric hoists, track incline, etc., motor generators, electric locomotives, mine buildings, powder house and numerous other items of equipment listed on pages 3, 4 and 5 of the appraisal. The total appraised value of the property in both States is $81,953.00 and the total indebtedness is $130,424.16. Of the total appraised value of $81,953.00, $36,005.00 represents the improvements on the Kentucky side, situate on the leased lands which contain *all* the coal.

It is averred in the petition and affidavits and *not denied* that if the property in West Virginia is sold apart from the property in Kentucky the creditors will suffer great injury, all the coal lands being in Kentucky, the necessary mining equipment being divided between the two States, while the only available railroad is situate on the West Virginia side; and that the coal mined on the leased land in Kentucky can only be

brought to a railroad by crossing the lands of the bankrupt in West Virginia. Willis Staten, of the firm of Staten and Keesee, for whom appellant Bias appeared at the first meeting, has filed an affidavit (which has not been challenged) (R. p. 67) from which it appears that he represents all the lessors and that he permitted Randolph Bias and Raymond Fleshman to be co-representatives with him, inasmuch as he could not be present, so that they might represent his clients at the first meeting of the creditors. He repudiates the conduct of appellants. He says that if the property is held intact "as a coal operation, it has a material value as an asset," but that if any portion of the holdings is sold separately, his clients, "being all of the lessors," will file suits to cancel all of the leases, because the property will, if sold separately, become worthless. Quoting: "If the West Virginia property held in connection with this mining operation is sold separate from the other, its only value would be the surface value * * * *. It would greatly impair the assets * * * * and result in injury to all the creditors. * * * * If the royalties are not paid and the value of the property is destroyed by a severance of the property, and the sale of some before the sale of all together, then suits will be filed in due course for the purpose of cancellation of leases, because the lessors and their counsel believe that the property is or will be thereby destroyed for the purposes under the leases." (R. p. 67.)

The following portion of Section V of the petition (R. p. 5) is undenied: "* * * * That a separate sale of the West Virginia property will result in greatly depreciating the value of the property in Kentucky,

which it is the duty of this court to administer, and it will likewise result in greatly depreciating the value of the West Virginia property, with no corresponding benefit to anyone, unless it be to the Special Commissioners" (by way of commissions on the sale of the West Virginia property).

It also appears that the laborers, and the unsecured creditors (represented by appellants) who have no judgment may be especially injured if the bankruptcy court does not retain jurisdiction, because, having no judgment or mechanics liens, they can not even participate in the proceeds derived from a sale of the property in the judgment lien creditors' suit in West Virginia, whereas in bankruptcy they can participate and claim priority of payment out of certain property.

It was a month after appellants had appeared and sought authority from the bankruptcy court to operate the mine, which was refused, that they attempted to withdraw and go back to the State court. They admit that it was because of an *adverse* decision on their motion that they wanted to withdraw. We quote from their answer (R. p. 32): "Being unable to induce the Referee to delay sale by the Trustee and permit the Trustee to temporarily operate the plant as desired by the Trustee himself and most, if not all, of the creditors represented by respondent Bias, including practically all the laborers and working men, to await a better market for the sale of the leases and mining plant your respondents were left to the alternative of abandoning their creditors' suit and omitting to carry out the decree of sale, or of continuing to completion that suit. * * * *"

The bankruptcy court, at the instance of appellants, incurred very considerable expense in having the detailed inventory and appraisal made, in employing a custodian for the property and in insuring the property in the sum of $50,000.00.

It is the contention of appellees that this case is readily distinguished from the general run of cases involving "conflicts of jurisdiction," and that it should be decided upon its own facts without regard to what may be the law, generally, with respect to conflicts of jurisdiction in cases of this kind, as to which we concede there is an apparent conflict of authority. It is our contention that it is immaterial what the rights of appellants might have been if they had not come before the bankruptcy court and voluntarily submitted to its jurisdiction. That they did submit to its jurisdiction, and in fact invoke its jurisdiction in matters relating to the administering of the estate, we think is established beyond peradventure by the uncontroverted facts. Recognition of their nominee's title to the property, his taking actual possession of the property on their motion, their petitioning the court to direct him to operate the property and the willingness of appellant Bias to accept appointment as counsel for the Trustee, seem to us conclusive on this question. But whatever may have been their intentions, in view of the lawfully acquired possession of the Trustee, we think this case resolves itself into one of law only and that the law applicable is contained in the opinion of this court in the case of Harkin vs. Brundage, 276 U. S. 36, 48 S. C. R. 268.

However, apart from the legal effect of actual possession of the property by the Trustee in Bank-

ruptcy, it is our position that the acts of appellants establish, as a matter of law, unequivocal recognition of the jurisdiction of the bankruptcy court. We do not see how appellants could have induced the court to take actual possession of the property and moved the court to order the Trustee to operate the property without thereby recognizing its complete jurisdiction over the property Surely they can not repudiate the jurisdiction following an unfavorable decision. We know of no law which would accord to them that right.

When we add to the facts mentioned in the foregoing paragraphs the equities of the situation, we respectfully submit that a strong case is made calling for the exercise by this court of the power to order up the entire record and decide the whole matter in controversy as if upon appeal.

Your petitioners submit with this motion transcripts of the records made in the lower courts.

ANDY NEW, JR., TRUSTEE,

THE FIRST NATIONAL BANK OF BLUEFIELD, and EDWIN MANN,

By ARTHUR F. KINGDON,
Of Counsel.